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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1288

JOHN PHILIP QUAGLINO,
Petitioner,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

MOTION OF AMICUS FOR LEAVE TO FILE AFFIDAVIT OF MARTIN T. ORNE, M.D., Ph.D.
and
AFFIDAVIT OF MARTIN T. ORNE, M.D., Ph.D.

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Amicus, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ("CACJ"), who seek simultaneously and under separate cover to file an amicus curiae brief in support of the petition herein, hereby moves this Court for an order permitting the filing of an affidavit of MARTIN T. ORNE, M.D., Ph.D., an internationally recognized authority in the area of hypnosis.

Amicus recognizes that on certiorari this Court must concern itself primarily with the record below. However, Dr. Orne's affidavit is submitted for the

primary purpose of alerting this Court of reasons, apart from and in addition to the merits of petitioner Quaglino's case, why it is important for this Court to clarify the constitutional issues related to admissibility of identification testimony of a witness who has undergone hypnotic "enhancement" of recall.

Amicus believes that this submission falls within the letter and spirit of the traditional role of amici to bring before the courts important considerations which may not otherwise be addressed.

The petitioner assents to the motion. It is opposed by the People of the State of California.

Dated: May 30, 1978

EPHRAIM MARGOLIN,
NICHOLAS C. ARGUIMBAU,
By EPHRAIM MARGOLIN,
Attorneys for Amicus Curiae.

AFFIDAVIT OF MARTIN T. ORNE, M.D., Ph.D.
State of Pennsylvania, County of Philadelphia

Martin T. Orne, M.D., Ph.D., being first duly sworn, deposes and says:

1. I am Professor of Psychiatry at the University of Pennsylvania and senior attending psychiatrist at the Institute of Pennsylvania Hospital. In addition to the usual psychiatric training, I also have a Ph.D. in psychology and have been principal investigator of a major research group working on the nature of hypnosis and related phenomena since 1960. I am Past-President of the Society for Clinical and Experimental Hypnosis, President of the International Society of Hypnosis, and have been Editor of the International Journal of Clinical and Experimental Hypnosis since 1962. I serve on the editorial boards of major journals of psychiatry and psychology and have served as a reviewer of research proposals for such government agencies as the National Science Foundation, the National Institute of Mental Health, the Air Force Office of Scientific Research, and the Office of Naval Research. I have published over one hundred scientific articles. I have used hypnosis extensively in clinical practice, have taught hypnosis in many academic contexts, and have carried out extensive research on the nature of hypnosis. In the course of my work I have consulted for a number of law enforcement agencies as well as other agencies of the government on matters relating to hypnosis. I have served as an expert witness in both state and federal cases, in jurisdictions ranging from Maine to California.

2. For a brief review of the nature of hypnosis, see the section on hypnosis in the current *Encyclopedia Britannica,* of which I am senior author. Of particular relevance to the issues to be discussed below are the following papers which I authored: "The potential uses of hypnosis in interrogation" (In A. D. Biderman & H. Zimmer (Eds.), *The manipulation of human behavior.* New York: Wiley, 1961. pp. 169-215), "Antisocial behavior and hypnosis: Problems of control and validation in empirical studies" (In G. H. Estabrooks (Eds.), *Hypnosis: Current problems,* New York: Harper & Row, 1962. pp. 137-192), "Social control in the psychological experiment: Antisocial behavior and hypnosis" (*Journal of Personality and Social Psychology,* 1965, *1,* 189-200), and "Can a hypnotized subject be compelled to carry out otherwise unacceptable behavior?" *(International Journal of Clinical and Experimental Hypnosis,* 1972, *20,* 101-117). Germane to the issue of memory under hypnosis is the phenomenon of hypnotic revivification or age regression. I have personally conducted one of the major studies in this field ("The mechanisms of hypnotic age regression: An experimental study." *Journal of Abnormal and Social Psychology,* 1951, *46,* 213-225). I was also the senior scientist responsible for the most extensive controlled study of this phenomenon that has been carried out to date (O'Connell, D. N., Shor, R. E., & Orne, M. T. "Hypnotic age regression: an empirical and methodological analysis." *Journal of Abnormal Psychology,* 1970, *76* (Monograph Supplement No. 3), 1-32). This latter study extended over several years and was sup-

ported by the National Institute of Mental Health. At this time I am principal investigator of a major research effort directed at the study of the hypnotic phenomenon. My laboratory has been particularly active in relating normal memory to hypnotically induced amnesia.

3. Over the past several years there has been a sudden upsurge of cases throughout the country which have involved the use and misuse of hypnosis. I have personally been involved in a considerable number of these cases and have provided consultative assistance to either the prosecution or defense in a large number of cases. While there have been some isolated instances of confessions elicited under hypnosis, these clearly involved self-incrimination and thus have not been introduced in court. On the other hand, there have been a number of instances where hypnosis was used in an effort to exonerate the defendant. A classic example of this kind appeared last year in the People of the State of California v Jeffrey Alan Ritchie, an individual accused of killing a two and one-half year old child who, when confronted with an overwhelming amount of circumstantial evidence, requested that he be hypnotized to enable him to remember the details which he could not. Under hypnosis he relived the experience in an exceedingly dramatic fashion, apparently indicting his wife for the murder and clearing himself. I testified to the unreliability of hypnosis and to the undue weight the jury would give to a video tape of this compelling episode. Since video tapes were available, it was possible to document how

the defendant had inadvertently been led by the hypnotist and to show a number of intrinsic inconsistencies which clearly indicated that the version the defendant relived under hypnosis was, consciously or unconsciously, confabulated to serve the needs of his case. After extensive testimony, the Court ruled to exclude the hypnotic evidence because of its unreliability.

An analogous situation occurred only two months ago during the retrial of a convicted murderer in the State of Ohio v Papp where the Court had authorized that the defendant be hypnotized and he apparently exonerated himself, causing the press throughout the state to proclaim his innocence. Since video tapes were available, it was possible to document that the defendant in fact was simulating, and by insisting that a series of tests, which my laboratory had developed for the recognition of simulation, be adminstered by the lay hypnotist hired by the defense, we could document that the defendant had never actually been hypnotized.

While such abuses are a problem, they are relatively unusual compared to the increasingly widespread use of hypnosis to help victims and/or witnesses recall crucial aspects of a crime or to facilitate the identification of a criminal prior to their testimony in court.

4. To appreciate the problems inherent in the use of hypnosis with witnesses and victims, it is necessary to review the facts about the nature of the phenomenon and its effect on recall.

The phenomenon of age regression induced by hypnosis is among the most dramatic and widely known procedures designed to increase recall for events which happened many years ago. The hypnotized individual may be told that he is six years old and at his birthway party. As a consequence, he will begin to act, talk, and to some degree think as a child. He may play as a child would, address the friends who apparently were at his birthday party, and describe in detail the room where the party is occurring, the people who are in attendance, the presents he is receiving, and so on. The naturalness with which these descriptions are given and the conviction that is communicated by the individual are compelling even to trained observers. The feelings which are expressed appear appropriate to a child more than to an adult, and the entire phenomenon is such that it is generally described as beyond the skills of even an outstanding actor. Finally, the material that is recovered during hypnotic age regression in a therapeutic setting is often of great importance to a patient's treatment. As Freud discovered at the end of the 19th century, the reliving of some of the traumatic events may result in the cure of troublesome hysteric symptoms, again lending credence to the historical accuracy of these events. For these reasons, there is a widely held belief among both laymen and practicing clinicians that the events relived during hypnotic age regression are historically accurate.

More recent work has shown that some of the events which patients relive in treatment may accurately reflect the emotions of the individual but need not accu-

rately portray actual historical events. Indeed, many such relived episodes actually combine several experiences. This fact in no way detracts from the usefulness of reliving these events in treatment where the purpose is to help the patient gain relief from his symptoms rather than to establish historical facts.

Experimental work with hypnotic age regression is possible because hypnosis is a phenomenon that can readily be induced in normal individuals. With sufficient effort it is possible to obtain materials that an individual will not have seen since he was six years old, then to age regress him back to that time and, while he is talking, acting, and writing like a child, to have him produce these same materials—for example, childhood drawings. The drawings that are produced superficially resemble those of a child. Until they are compared to what the individual had actually produced, one tends to accept them as "typical" of what a six-year old might have done. Analysis by experts quickly reveals that this is not the case, and when such drawings are compared with the actual drawings, it becomes obvious that the material obtained in age regression shows "sophisticated oversimplification."

As early as 1932, Stalnaker and Riddle ("The effect of hypnosis on long-delayed recall." *Journal of General Psychology,* 1932, *6,* 429-440) age regressed deeply hypnotized subjects to grade school where they had once learned *The Village Blacksmith* by Longfellow. In hypnosis these subjects appeared to be able to recite the poem far more easily with far better re-

call than in the wake state. Careful analysis, however, showed that there was only little additional recall; rather, a pronounced tendency to confabulate, i.e., make up, superficially appropriate sections for the words that could not be recalled in a style that resembled Longfellow. Often these confabulations were sufficiently good not to be recognized as such by a casual listener. This study first clearly established that there are two tendencies in hypnotic age regression: (1) a modest increase in the amount of material available to memory, and (2) a tendency a confabulate, to fill in those aspects which the individual cannot remember in an effort to comply with the suggestions of the hypnotist.

In subsequent research we have repeatedly documented both processes occurring within the same age regression session: an apparent increase in recall as well as an increased tendency to confabulate, to make up suitable memories, using whatever information was previously available to the individual. There were many times when subjects provided us with what appeared to be factual material relating to events that had occurred many years ago, i.e., their schoolmates who sat next to them in first grade. The subject would describe his classmates so vividly and with such conviction that we were surprised indeed to find that these individuals had not been members of the subject's class when we went to the trouble of checking the actual school records.

5. Because of the two tendencies which are facilitated by hypnosis, increased recall and increased con-

fabulation, it is extremely difficult to know which aspects of hypnotically aided recall are historically accurate and which aspects may have been confabulated. The details of material that is confabulated depend upon the subject's total past experience and all relevant cues that had been made available to him in the past. Subjects will use cues previously provided in the wake state in an inconsistent and unpredictable fashion; in some instances such cues are incorporated in the confabulated material, while in others the hypnotic recall may be virtually unaffected by them.

As a consequence of these limitations, I have found hypnosis dramatically useful in some instances where I have used it to help bring back forgotten memories of witnesses to crimes, while in others a witness might, with the same conviction, produce data that is totally inaccurate. This means that material produced during hypnosis or immediately after hypnosis, inspired by hypnotic revivification, may or may not be historically accurate. As long as this material is subject to independent verification its utility is considerable and the risk attached to the procedure minimal. However, there is no way by which a psychologist or psychiatrist, even with the most extensive experience in the field of hypnosis, can differentiate between an actual memory or a confabulation in a particular case without independent verification. Thus, there are many instances when subsequently verified accurate license numbers were recalled in hypnosis by individuals who previously could not remember them; by the same token, however, a good many license numbers which witnesses recalled turned out to belong to individuals where neither they nor their cars could possibly have been implicated. Unfortunately, a witness who is uncertain about his recall of a particular set of events can, with hypnosis, be helped to have absolute subjective conviction about what had happened, though the certainty can as easily relate to a confabulation as to an actual memory.

While under normal circumstances memory distortions may occur, the use of hypnosis can well nigh guarantee that a responsive subject develops subjective certainty about what has happened. He may come to believe that he can identify someone with certainty even though he had never actually seen him. By the same token, of course, he may also correctly recall that he had never seen the individual, or in another instance it will turn out that he did catch enough of glimpse to be able to bring an accurate image to mind. The crucial fact is that neither the subject nor the expert observer can distinguish between confabulation and accurate recall in any particular instance. The only way that can be done is on the basis of external corroborative data.

6. Recognizing the nature of the phenomenon, it becomes clear that hypnotizing either a victim or a witness, while not infringing upon their rights (unless it turns out they were an accomplice), certainly compromises the rights of an individual who is incorrectly identified. Courts have in the past tended to recognize that information obtained under hypnosis may not be accurate, that it may be confabulated,

and that a deeply hypnotized individual is capable of actually lying. Further, it is acknowledged that a jury or even a judge unfamiliar with the dramatic impact of the hypnotic phenomenon may easily be unduly influenced and may, therefore, give inappropriately great weight to the material brought forth under hypnosis—even if it is explained that this material is not historically accurate. For these reasons and because proper cross examination cannot be carried out, courts have generally held that testimony given under hypnosis is not admissible, a ruling which seems eminently appropriate in view of the ease with which even trained psychiatrists or psychologists are misled by material produced by the hypnotized individual.

Largely unrecognized, however, has been the potential effect of hypnotic techniques designed to "refresh the memory," *i.e.*, facilitate recall of a witness. Starting over three years ago the Los Angeles Police Department began training detectives in the use of hypnosis in interrogation. This program, under the supervision of a psychologist, has been enthusiastically endorsed by the police officer students and has inspired interest in police departments across the country. Not only have police officers come to Los Angeles to obtain training, but lay hypnotists in several parts of the country have been engaged by police departments to provide "training" so that their detectives may utilize this modality in their work. Even the Federal Bureau of Investigation has had great interest in the use of hypnosis, and while it has been their

policy to engage competent psychiatrists or psychologists to induce hypnosis, they have trained special agents to carry out interrogation during hypnosis once it has been induced.

As was discussed earlier, there is no doubt that hypnosis can be a useful investigative tool when a witness is enabled to remember verifiable factual information which provides new leads to the solution of a crime. Provided the witness or victim is willing, I can see no reasonable objection to the use of hypnosis in this manner as long as the material remembered during hypnosis is not subsequently used in court as part of the testimony given by an eyewitness. It is in that context where an ever increasing number of abuses are encountered.

7. To fully appreciate the problems which may follow from a hypnotic session, it is necessary to recognize the scientific fact that a deeply hypnotized individual who is asked to remember or describe something which occurred while he was asleep or not actually present will, with sufficient suggestive pressure, almost always produce something which appears to be a memory. This is best illustrated by the phenomenon of age progression where a subject is told that it is the year 2000 and asked to describe the world around him. Such a suggestion given to the deeply hypnotized individual, will lead to a vivid and compelling description of all kinds of new, as yet unseen, scientific marvels. Obviously, the plausibility and the precise nature of the subject's description will

depend upon his scientific knowledge, his reading, and his intelligence.

The same process that is involved in permitting an individual to hallucinate the environment of the year 2000 can also be involved when he is urged to recall what happened six months ago, especially if he lacks the memory traces to permit him to remember accurately. Unfortunately, such pseudomemories can and often do become incorporated into the individual's memory store as though they had actually happened. It is worth noting that this can occur even with bizarre memories such as when people "recall" their past lives and become convinced that these events really took place or, in other instances, when individuals under hypnosis remember encounters with flying saucers and become convinced they have actually communicated with beings from another galaxy. In such instances, the sophisticated listener smiles about the individual's assertions since it is obvious that they represent pseudomemories. Unfortunately, if such pseudomemories relate to events which occurred six months ago and are eminently plausible, there is no way for either the hypnotist or the subject or the finder of fact to distinguish between them and actual recall of what occurred.

The content of pseudomemories when they are wittingly or unwittingly induced during hypnosis is, of course, not random. If someone has just seen a science fiction film, one can usually recognize elements of that film in his description of what is going on about him in the year 2000; similarly, if a witness is hypnotized

and has factual information casually gleaned from newspapers or inadvertent comments made during prior interrogation or in discussion with others who might have knowledge about the facts, it is inevitable that many of these bits of knowledge will become incorporated and form the basis of pseudomemories. Furthermore, if the hypnotist has beliefs about what actually occurred, it is virtually impossible for him to prevent himself from inadvertently guiding the subject's recall so that he will eventually "remember" what he, the hypnotist, believes actually happened. It must be emphasized that we are not usually dealing with a conscious effort on the part of the hypnotist to distort a witness's memories: on the contrary, the process of cuing the hypnotized subject is usually outside of the hypnotist's awareness.

In every instance I have examined where tapes have been available of sessions conducted under hypnosis there are clear examples of explicit and implicit suggestions to the subject which unmistakably communicate what is wanted by the hypnotist and/or other questioners. The nature of hypnosis is such that the individual's suggestibility is increased. Therefore, the risk of creating memories for an eyewitness, rather than merely bringing forth recollections that were not previously available, is tremendous. This is true even with a highly qualified psychiatrist or psychologist. For this reason, in research complex control procedures are utilized to evaluate the effects on unwitting communication to the subject, and the importance of these factors is generally recognized in all

research involving interaction with human subjects. Considering the ease with which one may unwittingly produce data in the laboratory where the scientist has been trained to work under standard conditions and in a neutral fashion, the likelihood of producing the memories the hypnotist hopes to find when he is a detective sergeant who has a profound commitment to a theory of a given crime seems overwhelming. Only the most stringent control procedures can reduce the likelihood of contaminating a witness.

8. There are a large number of instances where a victim or a witness is hypnotized and as a consequence significantly altered his recollection of the events surrounding a crime. Some of these new memories represent accurate recall while others are the consequence of confabulation. Unfortunately, without independent verification, it is simply not possible to know whether the changed memories reflect an augmented recall or whether they represent alterations in a witness's memory in ways congruent with the theories held by the investigating authorities and the hypnotist. I will cite only two examples from actual cases which illustrate the kind of problems that easily occur.

A. In 1975, at the Philadelphia Naval Base, two seamen recuperating from illness were working in an office with a Dutch door that was open out into a hallway. A black sailor, neither had previously met, walked by and returned a few moments later with a pistol, aimed at one of the sailors (Foley) and shot at

his head. Fortunately, Foley moved quickly and suffered only a grazing wound to his ear. The assailant fled the scene. Subsequently the two seamen, who themselves were not previously acquainted, were separately interrogated and shown pictures of individuals who might have fit the description and could have been in the area. The witness (Dann) identified one of the pictures. The victim (Foley) tried to identify someone but was unable to do so. Though he indicated that one picture looked much like the person, he could not identify him. Subsequently at a preliminary hearing, Foley was present when the witness, Dann, identified the assailant as Seaman Andrews who was, of course, also present. Foley, however, at that time again indicated that he could not identify Andrews as the assailant, though he looked like the person. The prosecution obtained Foley's consent to be hypnotized in order to better remember the events that had transpired. He was hypnotized by an experienced Navy psychiatrist. During the first session he was still unable to make an identification. However, during a second session he finally identified the assailant as Seaman Andrews, the person whom he had previously indicated he could not identify. He was now willing and indeed eager to testify that Seaman Andrews was his assailant.

At the General Court Martial, which took place at the Philadelphia Naval Base (U.S. v SA Kenneth Andrews), the issue of the role of hypnosis was raised by the defense and I was asked to testify as an expert. I pointed out the issues discussed earlier

and emphasized the fact that Seaman Foley's reaction to hypnosis would likely have been the same whether or not he could actually remember the assailant. Thus, if he continued to be unable to remember him—which was highly likely considering the difficulties encountered in eliciting the recollection—he would have been prone to confabulate an individual who appeared to be the most likely candidate. He had seen Andrews accused during the preliminary hearing and was aware that Dann had identified him with certainty and, further, that it was the general belief of the prosecution that Andrews was guilty. The hypnotic session changed his memory and, while he would now testify to what he erroneously believed his original memory to have been, he would in fact be testifying on the basis of what he had been led to recall during hypnosis, which was quite different from his actual earlier memories.

In that instance the military judge ruled that Foley could testify to those things which he had previously testified to, but since his memory was altered by hypnosis, he was not permitted to identify Andrews. In the week following this event, two individuals who had left for overseas the evening of the incident returned from Germany and independently corroborated Seaman Andrews' alibi, making it extremely unlikely that he was the actual assailant. In this case it is interesting that the effect of hypnosis on Foley's memory persisted, and well over a year after the event he still asserted his conviction that Andrews had in fact fired the shot which nearly killed him.

B. A more complex problem is is illustrated by a case involving a trial not yet completed (State of California v. Bickneli and State of California v. Terri Milligan and Karen Kirby). The witness in this case is a 14-year old girl whose sister, aunt, grandmother, and cousin were stabbed to death in their home. The witness lived with her mother and other sister in another house and had apparently been visiting at her grandmother's house with a girl friend. The individuals accused of the murder are a 19-year old cousin, another 15-year old girl who was his mistress, and a girl who had been the witness's closest companion, also 14 years old. The issue here is not the facts of the case but rather the inherent problems raised when the prosecution decided two days prior to the preliminary hearings to have Rayleen undergo hypnosis before she could be questioned by the defense.

Prior to this event, Rayleen had been interrogated extensively and had developed a good relationship with the interrogator. After initially denying being present during the murder, she admitted, 4 months after her initial questioning by the police, that she had been there and gave a variety of descriptions of the events which took place. Each description differed from the others in important aspects, though it is reasonably clear from the two taped interrogations that even in the wake state she was very responsive to leading questions from the interrogator. Overall, her reports were extremely inconsistent and, furthermore, she insisted that the whole episode was merely a

bad dream, she allowed it could have happened but asserted that she really did not believe this was so. Finally, she became quite emotional during the interrogation.

All of these factors were felt to mitigate against her effectiveness as a witness, and since she was the only witness, the prosecution stated that it was their hope that hypnosis would allow her to give her testimony more comfortably. The investigators and the psychiatrist who hypnotized her indicated that hypnosis was safer than sodium pentothal which she had originally requested so that she would be believed and could remember more accurately. The doctor also assured her that there would be no difficulty and implied that she would know, following hypnosis, that her memories had not been a dream. Rayleen was hypnotized and told a story whose major outlines were similar to material she had brought forth previously except that it was somewhat more consistent with what the investigator seemed to have been interested in, such as accounting for her arrival time at the house where the murder occurred. While the psychiatrist had induced hypnosis, the bulk of discussion during hypnosis was carried out by the investigator whom she apparently was very eager to please. Previously the witness had been unwilling or unable to answer the question of how she got home to the friend with whom she was staying. She had claimed that she must have passed out but she wasn't sure because it was only a dream. During the hypnotic session the hypnotist clearly implied that the events she described

had occurred and were not a dream. Rayleen also described how she was hit over the head and knocked out at the scene of the crime and woke up the next day in her friend's bed with a pain in her head.

This latter kind of memory is an example of what is termed a "screen memory" in psychiatry. It is a memory designed to make it unnecessary to recall other things which the patient does not wish to recall. This fact was recognized by the prosecution psychiatrist, who acknowledged that it was very unlikely she had actually been hit over the head; however, he felt it would not be to the patient's advantage to help her remember more. In sum, a story was obtained during hypnosis which clearly implicated the three suspects and Rayleen's screen memory was accepted as if it were true.

It is my understanding that under California law Rayleen's testimony, if she had been an accomplice, would have been considerably less useful, and in the absence of independent verification, it could not have been used.

The consequences of the hypnotic session were striking. Whereas before Rayleen's description of the events changed with every time she was asked to tell about them, there is now a consistent story; whereas previously she had insisted it was all like a dream, she now comes to accept the fact that it was not a dream, and by the time of trial is able to state with certainty that it was not a dream, a process which she clearly relates to the hypnotic session. Further, despite her age, she is now able to successfully resist any

attempt by counsel to question her certainty about what occurred. Whereas before hypnosis she was highly responsive to leading questions, after hypnosis her story has become fixed.

In this situation hypnosis clearly altered the nature of the witness. Instead of an uncertain, confused individual who gives an inconsistent description which she believes might well be a dream, it is now a self-assured young girl who appears thoroughly convinced about what actually happened, including the fact that she was hit over the head and could not remember what happened until she woke up in her friend's bed.

That she now is convinced, even about an aspect of her story which is an obvious falsehood, is particularly instructive. Thus, not only does the prosecution psychiatrist acknowledge that she was probably not hit on her head, independent of my own evaluation, but we also have the record of a physical examination conducted within 48 hours of the event where a physician failed to see any evidence of trauma (whereas a blow on the head sufficient to cause unconsciousness for such a long period would still be clearly recognizable for some time after the event, at least in the form of localized swelling and tenderness).

Here hypnosis has the effect of radically altering the nature of the witness. While much of the content that is remembered stays the same, the subjective conviction of the witness is entirely different, and she has selected specific contents of her past descriptions which she now sticks to consistently. We do not know the truth of what she asserts; however, the as-

pect of the story relating to being hit on the head, which is virtually certain to be untrue, is now told with complete conviction. Rayleen's experience of having told the story in hypnosis and having it accepted as real by both the psychiatrist and the interrogator seems to have made it real for her.

There is no way in which the process that has taken place could be reversed. The defense simply does not have the opportunity to cross examine the witness who existed prior to hypnosis. The hypnotic process was not utilized in this instance to obtain additional information but to alter the nature of the witness and to convince her that the events she related under hypnosis had actually happened that way. I know of no procedure which could change a witness as effectively as hypnosis in such a situation.

The misuse of hypnosis seems self-evident. The prosecution acknowledges that it was not primarily intended to obtain more factual information that could be verified, and the prosecution psychiatrist acknowledges that he was aware of the screen memory but chose not to explore the matter, thereby virtually foreclosing the possibility of the defense effectively exploring the matter under cross examination. Further, the prosecution psychiatrist under cross examination acknowledged that it is entirely plausible that the material which is concealed by the screen memory would actually implicate the witness either as a participant or an accessory to the crime.

9. The two cases cited above are merely illustrations of a large number of instances of cases with which I

am familiar, ranging from Florida to New Jersey, from Pennsylvania to the Middle and Far West. It is, of course, posssible with proper expert testimony to clarify the issues on a case-to-case basis. Unfortunately, there are few experts willing and able to present the facts to the courts. The number of serious research scientists working with hypnosis is limited, and it requires an intimate familiarity with both the research and the clinical literature to clarify the problems in any individual instance. The scarcity of experts needs to be juxtaposed with the fact that police officers are being trained in large numbers throughout the country, that it requires very little training to induce hypnosis, and that in many instances hypnosis is conducted without video tapes or, as in a current case in New Jersey, without any tape record at all, though here again the witness's memories were greatly altered.

The complexity of the issues is such that it requires appropriate testimony for the courts to fully appreciate the issues involved. The costs that every such trial involves are considerable, not only in terms of money but also in terms of scarce resources on the part of the courts as well as the prosecution and defense. Finally, the issues seem to involve the most basic rights of an individual to confront his accuser without having to be concerned that the accuser's mind has wittingly or unwittingly been altered by special procedures not well understood by the public at large.

10. The use of hypnosis and related techniques to facilitate memory raises profound, complex questions, and it is likely that the individual will only be protected if these issues are dealt with at the highest level of our court system. There are instances when hypnosis can be used appropriately provided the nature of the phenomenon is understood by all parties concerned. However, it must be recognized that the use of hypnosis by either the prosecution or the defense can profoundly affect the individual's subsequent testimony. Since these changes are not reversible, if individuals are to be allowed to testify after having undergone hypnosis to aid their memory, a minimum number of safeguards are absolutely essential:

A. Hypnosis should be carried out by a psychiatrist or psychologist with special training in its use. He should not be informed about the facts of the case verbally; rather, he should receive a written memorandum outlining whatever facts he is to know, carefully avoiding any other communication which might affect his opinion. Thus, his beliefs and possible bias can be evaluated. It is extremely undesirable to have the individual conducting the hypnotic sessions to have any involvement in the investigation of the case. Further, he sould be an independent professional not responsible to the prosecution or the investigators.

B. All contact of the psychiatrist with the individual to be hypnotized should be video taped from the moment they meet until the entire interaction is

completed. The casual comments which are passed before or after hypnosis are every bit as important to get on tape as the hypnotic session itself. (It is possible to give suggestions prior to the induction of hypnosis which will act as posthypnotic suggestions.)

Prior to the induction of hypnosis, a brief evaluation of the patient should be carried out and the psychiatrist should then elicit a detailed description of the facts as the witness or victim remembers them. This is important because individuals often are able to recall a good deal more while talking to a psychiatrist than when they are with an investigator, and it is important to have a record of what the witness's beliefs are before hypnosis. Only after this has been completed should the hypnotic session be initiated. The psychiatrist should strive to avoid adding any new elements to the witness's description of his experiences, including those which he had discussed in his wake state, lest he inadvertently alter the nature of the witness's memories—or constrain them by reminding him of his waking memories.

C. No one other than the psychiatrist and the individual to be hypnotized should be present in the room before and during the hypnotic session. This is important because it is all too easy for observers to inadvertently communicate to the subject what they expect, what they are startled by, or what they are disappointed by. If either the prosecution or the defense wish to observe the hypnotic session, they may do so without jeopardizing the integrity of the session through a one-way screen or on a television monitor.

D. Because the interactions which have preceded the hypnotic session may well have a profound effect on the sessions themselves, tape recordings of prior interrogations are important to document that a witness had not been implicitly or explicitly cued pertaining to certain information which might then be reported for apparently the first time by the witness during hypnosis.

11. It should be emphasized that the safeguards outlined above are necessary whenever there is any *possibility* that a witness or victim would be asked to testify in court as an eyewitness. They would not be necessary if there is no such possibility. On the other hand, it is crucial to recognize that if hypnosis is used during an investigative process without these minimal safeguards, the subsequent testimony of the witness or victim in court can no longer be evaluated. Since the hypnotic phenomenon makes it possible to irreversibly alter memory, these safeguards are essential to assess whether hypnosis is likely to have tampered with the evidence in the witness's mind. It is possible for experts to evaluate these data and, if necessary, objectively establish the kind of changes that have taken place in a witness's recollections following hypnosis, and determine whether these can be traced to specific cues which were made available to the individual. Only such an assessment would allow the finder of fact to make an informed decision about an eyewitness report of a witness or victim who had been hypnotized. Without such safeguards, recollec-

tions "facilitated" by hypnosis are *less* reliable than normal recall and should not be allowed in court.

Inevitably it will be argued by some that hypnosis has only been used to facilitate memory and that its possible distorting effects are minimal and can, as a practical matter, be ignored. Not only do such arguments fly in the face of scientific evidence but the reason why hypnosis is receiving such attention by law enforcement agencies is because it is recognized as an effective tool, capable of facilitating (or altering) recollections. The testimouy of a witness whose memories have been altered by hypnosis has all the pitfalls of testimony given during hypnosis, with the additional insidious complication that the effects exerted by hypnosis are no longer obvious.

Finally, it will be argued that the safeguards outlined above are not feasible as a practical matter, that they would interfere with the ready use of hypnosis in the course of criminal investigations. While it requires additional thought prior to the use of hypnosis, following the guidelines would actually improve the quality of the investigative use of hypnosis. However, there is no real choice since it is the only way that the rights of the defendant can be protected. The guidelines do not place an onerous burden on the investigating authorities; rather, analogous to the rules preventing the admission of coerced confessions, the insistence of such guidelines will minimize the likelihood of creating a false eyewitness. Only a clear ruling protecting the defendant's rights if eyewitnesses have

been hypnotized prior to their testimony in court will prevent the widespread, uncontrolled misuse of this technique as training in the modality becomes increasingly widespread among our country's local, state, and national police forces.

/s/ Martin T. Orne

Subscribed and sworn to before me
this 25th day of May, 1978

/s/ J. L. Purfield
Joseph L. Purfield
Notary Public, Phila., Phila. Co.
My commission expires July 14, 1980